No. 82-960

Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CITY DISPOSAL SYSTEMS, INC.
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF TEAMSTERS FOR A DEMOCRATIC UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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IN THE

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THE INTEREST OF AMICUS CURIAE

Teamsters for a Democratic Union ("TDU") is a voluntary unincorporated association of thousands of rank-and-file Teamster members seeking to reform and democratize their union, and in so doing, to make it more responsive to their needs. As is true for the International Brotherhood of Teamsters itself, the core of TDU's membership — and particularly of its predecessor organization, PROD — is employed in the trucking industry as drivers and warehouse workers.

One of the significant shortcomings of the Teamsters union has been its lack of commitment to occupational safety and health in the trucking industry, a matter of concern not only to its members but to the general public who must share the road with vehicles which, all too often, are unsafe. Although must trucking contracts contain strong safety clauses similar to the one between Teamsters Local 247 and City Disposal Systems (Joint Appendix 64-65), enforcement of those clauses tends to be left to the initiative of individual truck drivers who must be willing to risk their jobs to do so. Indeed, it was not until several years after the formation of TDU's predecessor, the Professional Drivers Council for Safety and Health, which became known as PROD, that the Teamsters even formed a Safety Department and hired a Safety Director.

A large number of TDU/PROD members have been involved over the years in cases requiring application of the rule at issue here, which was first approved in *NLRB v. Interboro Contractors,* 388 F.2d 495 (2d Cir. 1967). Moreover, attorneys for TDU members as intervenors have played a significant role in the shaping of the law in this area.[1] TDU files this brief, by written consent of the parties, in order to discuss the special circumstances facing a driver who wishes to protest an assignment to drive an unsafe truck, and to show that the interests not only of truck drivers but also of the public at large depend on the continued protection of drivers who refuse to operate trucks because they reasonably believe them to be unsafe and thus contrary to the requirements of their collective bargaining agreement.

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[1] *E.g., Kohls v. NLRB,* 629 F.2d 173 (D.C. Cir. 1980); *United Parcel Service,* 234 NLRB No. 85 (1978), *enf. denied,* No. 78-1258 (6th Cir., Oct. 12, 1979); *Banyard v. NLRB,* 505 F.2d 342 D.C. Cir. 1974), *on remand, Roadway Express,* 217 NLRB No. 49 (1975).

SUMMARY OF ARGUMENT

TDU agrees with the Board that the *Interboro* doctrine is a proper application of § 8(a)(l) of the National Labor Relations Act. However, this case does not require the Court to decide that question for all employees in all industries. A truck driver's job is unusually dangerous, and contacts with the employer concerning safety questions normally occur in isolation from other drivers. In these circumstances, appeals to the collective bargaining agreement, which is enforced by the union, are a driver's principal source of collective support for a refusal to take unsafe equipment. Accordingly, employees in the trucking industry are entitled to protection under § 7 when, based upon a reasonable belief that a truck is unsafe, they refuse to drive it pursuant to a reasonable belief that they have a right to do so under their collective bargaining agreement and then grieve a subsequent discharge as provided by the agreement.

ARGUMENT

A TRUCK DRIVER WHO, PURSUANT TO A COLLECTIVE BARGAINING AGREEMENT, REFUSES TO DRIVE A TRUCK AS UNSAFE AND GRIEVES HIS CONSEQUENT DISCHARGE, IS ENGAGED IN PROTECTED CONCERTED ACTIVITY SO LONG AS HIS BELIEF THAT THE TRUCK WAS UNSAFE WAS BOTH SINCERELY HELD AND REASONABLE IN LIGHT OF THE INFORMATION AVAILABLE TO HIM AT THE TIME OF HIS REFUSAL.

TDU endorses the arguments of the Board in support of the *Interboro* doctrine generally. In particular, we commend to the Court's examination the careful review of the legislative history of § 7 contained in Gorman and Finkin, *The Individual and the Requirement of "Concert" Under*

the National Labor Relations Act, 130 U. Pa. L. Rev. 286, 331-346 (1981). Our purpose here, however, is to argue a more narrow point, concerning the particular suitability of *Interboro* as applied in the trucking industry.

Although *NLRB v. Interboro Contractors,* 388 F.2d 495 (2d Cir. 1967), arose in the construction industry, its rule has subsequently been applied far more frequently among truck drivers than any other occupation. *E.g., McLean Trucking Co. v. NLRB,* 689 F.2d 605 (6th Cir. 1982); *Kohls v. NLRB,* 629 F.2d 173 (D.C. Cir. 1980); *Bloom v. NLRB,* 603 F.2d 1015 (D.C. Cir. 1979); *Roadway Express v. NLRB,* 532 F.2d 751 (4th Cir. 1976), *aff'g without opin.,* 217 NLRB No. 49 (1975); *NLRB v. Adams Delivery Serv.,* 523 F.2d 96 (9th Cir. 1980); *NLRB v. Buddies Supermkts,* 481 F.2d 744 (5th Cir. 1973); *Illinois Ruan Transp. Corp. v. NLRB,* 404 F.2d 274 (7th Cir. 1968). And, in the majority of these cases, the problem arises when a driver refuses to drive a truck because he believes it to be unsafe. There are two reasons for this recurring problem, both of which demonstrate why the Interboro doctrine should be upheld in this context.

The first is that truck-driving is an extremely dangerous profession. Driving long hours, at high speeds, in vehicles weighing up to 80,000 pounds and measuring up to 90 feet in length, is a high risk occupation for both the driver and other motorists.

The risk is compounded by the fact that vehicle safety is well below par. According to the Bureau of Motor Carrier Safety, in 1980, the year in which the NLRB heard this case, some 2.5 violations were found for each safety inspection, and one out of every two inspections produced a violation serious enough to require that the vehicle be taken out of service. BMCS, *1980/1981 Roadside Vehicle Inspection Report* 17 (1982). Therefore, it is not surprising that, although coal-mining has been considered the most dangerous job in the United States, the transportation in-

dustry produced almost twice as many fatal occupational injuries in 1980.[2] Indeed, in that year trucking and warehousing produced more per capita injuries leading to the loss of work days than any industry save the manufacture of lumber and wood products. Bureau of Labor Statistics, *Occupational Injuries and Illnesses in the United States, 1980* (1982), at 30-32. *See also* Baker, *et al.*, *Fatal Occupational Injuries,* 248 J. Am. Med. Ass'n 692 (1982)(Maryland study shows that in 1978 more fatalities were caused by road vehicles than by any other cause; half of this category were truck drivers killed in crashes). But safety costs employers money in two ways: the actual cost of maintaining and repairing vehicles and the unproductive but compensated time spent by drivers waiting for a vehicle to be returned to proper condition. Thus, employers have a great incentive to pressure drivers to take marginal vehicles on the road. *See, e.g.,* J.A. 52 and Tr. 354-356 (great financial pressure on employers to use its own trucks "at all cost").

Although the drivers themselves obviously have a strong interest in reducing this carnage, the general public interest is even stronger. *See Banyard v. NLRB,* 505 F.2d 343, 347 (D.C. Cir. 1974). There are some 44 accidents every hour involving large trucks alone. In 1981, this produced 5,779 fatalities, of which only 1,131 were occupants of the truck (mostly drivers). Eicher, Robertson and Toth, *Large-Truck Accident Causation* xi, I-1 (NHTSA 1982). These problems are amply reflected by the record of this case, which shows that one of the accidents caused by truck 244's bad brakes led to a chain collision on an interstate highway involving three cars and another truck. Tr. 29-34.

Second, the *Interboro* problem frequently arises in trucking because, unlike workers in manufacturing, min-

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[2]The fatality figures involve all forms of mining and mineral extraction, and all forms of transportation and utilities. Coal mining and trucking comprise the most dangerous portions of each category.

ing, construction or almost any other industry, the drivers do not work side-by-side with other employees. Rather, their contacts with management personnel are almost always on a one-to-one basis. Thus, a driver begins an assignment, receives a truck, performs the pre-trip safety inspection, and decides whether or not to resist pressure from the employer to accept unsafe equipment, in isolation from other drivers. Most of the working day is spent alone in the cab of a tractor and, if a safety problem arises on the road, the driver must deal with the employer by telephone, with no fellow employees present.

Although there may be workers from other departments present at the beginning or end of the trip, they are of little collective assistance. For example, the only workers present for James Brown's meetings with management were a janitor, who knew nothing about trucks, Tr. 153; the mechanics, whose work a driver is challenging when he refuses an unsafe truck and who may well belong to a separate bargaining unit represented by another union, Tr. 368;[3] and another driver who was waiting for his own truck to be repaired so that he could leave on an assignment. J.A. 19. In these circumstances, it is the collective bargaining agreement, which is enforced by the union, that is the primary if not the only source of support for a driver who seeks concerted assistance from his fellow employees in refusing to drive an unsafe truck.

The Court of Appeals viewed Brown's "individual" interest in being assigned a safe truck as separable from the collective support which he received when he refused to drive truck 244 because it was unsafe. It recognized that Brown and the union acted in concert concerning Brown's grievance over his discharge, but stated that "the union made no effort to protest the use of the truck." 683 F.2d

[3]City Disposal's mechanics reacted with hostility to drivers who brought trucks in for repairs. Tr. 123.

at 1007. We respectfully submit that the Court of Appeals' ruling in this regard rests on a false dichotomy. The only practical way for a driver like Brown to take effective action to protest working conditions that he reasonably believes to be unsafe is to refuse to drive the truck, pursuant to the protections of the collective bargaining agreement. If the driver accepts a dangerous truck and then files a grievance, the assignment will be completed by the time the grievance can be heard. But by that point, no relief will be available, and the grievance will have become moot. Moreover, the risks, both to the driver and to the public, attendant upon driving an unsafe truck, will not in any way be abated by a post-assignment grievance. Thus, the only way for the drivers to protect their own interests, and those of others on the road, is to refuse the truck, be disciplined, and then grieve the discipline.

This, indeed, is the means of safety enforcement contemplated by Article XXI of the collective bargaining agreement in this case. Section 1 generally prohibits the employer from requiring the operation of unsafe equipment, and specifically authorizes drivers to refuse such equipment "unless such refusal is unjustified." J.A. 64. Section 4 prohibits the employer from requiring any driver to operate unsafe equipment which another employee has reported as unsafe until the mechanical department certifies it as safe. J.A. 65. The only practical way to invoke these provisions is to refuse a truck and, in the event of discipline, use the grievance procedure to determine whether the refusal was "unjustified."

It can scarcely be gainsaid that the reasonable pursuit of grievances in the manner contemplated by the collective bargaining agreement — *i.e.*, an appeal for support to other employees, through the union — constitutes "concerted" activity. *E.g., NLRB v. Quality Mfg. Co.*, 481 F.2d 1018, 1021 (3d Cir. 1973), *rev'd on other grounds sub nom. ILGWU v. Quality Mfg. Co.*, 420 U.S. 276 (1975).

See also Roadway Express v. NLRB, 700 F.2d 687, 693-694 (llth Cir. 1983)(reluctantly rejecting *Interboro,* absent indication by higher authority, because of Fifth Circuit precedent). Such action is concerted even if the grievance is addressed to a particular truck, and without respect to the merits of the grievance, *NLRB v. Adams Delivery Service,* 623 F.2d 96, 100 (9th Cir. 1980); *NLRB v. Selwyn Shoe Mfg. Corp.,* 428 F.2d 217 (8th Cir. 1970), although it may be protected only if the employee has a good faith and reasonable belief that the collective bargaining agreement has been violated. *Banyard v. NLRB,* 505 F.2d 342, 348 (D.C. Cir. 1974).

Here there is no question that Brown's refusal to drive truck 244 was part of a concerted activity among City Disposal's drivers. The truck's brakes were notorious among the drivers. Tr. 144. On the Saturday before Brown refused to take truck 244 on the road, another driver, Frank Hamilton, brought the truck back from work and, with Brown present, insisted that the brakes be repaired. The head mechanic said that the brakes could not be fixed over the weekend because the right kind of brake shoes were not in stock. J.A. 7-8. When Hamilton did not come to work on Monday morning and Brown was told to drive truck 244, it fell to Brown to enforce Hamilton's demand for brake repairs by refusing the truck until repairs were made.[4]

In the discussion leading to Brown's discharge, both Brown and the supervisor recognized the collective nature

[4]The Court of Appeals believed that Brown was acting indiidually rather than in concert, citing the fact that he failed to post a notice concerning the brakes or to warn other employees about the brakes. 683 F.2d at 1007. This ignores the fact that Brown was not acting based on his own experience driving the truck, but in response to a warning from another driver. It also rests on another false dichotomy, because the question is not whether Brown could have done *more,* but whether what he did was concerted action. Surely, the action of a driver who responds to the warning of another driver is just as concerted as the action of the driver who issues the warning.

of the problem. The supervisor complained that all the drivers were refusing to take equipment, that these refusals were hurting the company, and that he was "tired of hearing" such complaints. J.A. 11-12. Brown, for his part, replied, "What are you going to do, put the garbage ahead of the safety of the men?" J.A. 12. And, when Brown was fired for refusing the truck, the union joined his protest by demanding that he be put back to work because his refusal was justified. J.A. 31-32. Although the union ultimately decided not to take Brown's case to arbitration, which it was entitled to do as an exercise of discretion under *Vaca v. Sipes*, 386 U.S. 171 (1967), that does not negate either the concerted character of the activity for which he was discharged or the reasonableness of Brown's belief at the time that the truck was unsafe.

Furthermore, there is substantial evidence in the record to support the Board's finding that Brown's belief that the brakes were unsafe was sincere and reasonable, and therefore that his concerted activity was protected. Truck 244's brakes were notoriously difficult to handle. Tr. 144.[1] Sometimes they worked and sometimes they didn't work at all, so that it took unusual skill, caution and experience to drive that tractor. Tr. 143. Only two days before his refusal, Brown was almost hit by truck 244, and he had been present when even the truck's experienced driver told the mechanics that he could no longer operate it safely without major brake repairs. J.A. 7, Tr. 142. He also heard the mechanics say that the repairs could not be done over the weekend, J.A. 7, and in fact there is nothing in the record to suggest that City Disposal had any work done — not to speak of obtaining the approval required by Article XXI, Section 4 of the contract — before Brown was asked to drive the truck.

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[1] When Brown previously served as a supervisor, he had received numerous complaints about the truck. J.A. 8. *See also* Tr. 25.

Finally, although the truck was involved in no accidents in the few days following Brown's refusal to drive it, both drivers who took it found the brakes to be unsafe and in need of repairs. Tr. 143-144 (Hamilton); Tr. 229, 237-238, 245-246 (Tyner believed brakes were unsafe and posted notice to that effect). Whether or not the brakes were in fact unsafe, Brown's belief was both sincere and reasonable given the facts available to him, and the Board's finding in that regard is supported by substantial evidence.

To require further evidence in situations such as this would only result in drivers taking more unsafe trucks on the road, which will greatly increase the risk of injury to both truck drivers and the general public. James Brown acted in accordance with the principles of concerted activity in protesting the assignment of what he reasonably believed to be an unsafe truck. Accordingly, both the National Labor Relations Act and sound public policy dictate that he be protected from discipline on account of that activity.

CONCLUSION

For these reasons, the decision of the Court of Appeals should be reversed, and the case remanded with instructions to deny the petition for review and grant the application for enforcement of the Board's order.

Respectfully submitted,

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